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No. 129

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALL AMERICAN AIRWAYS, INC., ET AL., PETITIONERS

v.

UNITED AIR LINES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD

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This case involves an order of the Civil Aeronautics Board granting certificates of public convenience and necessity to numerous air carriers, which had been conducting operations under exemption authority, authorizing them to perform (in many instances, for a five-year period) various services supplemental to those provided by the regular air route operators.[1] The certificates permit an unlimited number of charter flights between any points in the United States and, additionally, flights, not to exceed ten per month between any two points, carrying individually ticketed

[1] The opinion below (*United Air Lines, et al.* v. *Civil Aeronautics Board, et al.*, Nos. 15,025, *et al.*) is set forth in the appendix to the petition for certiorari.

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passengers or individually waybilled cargo. The Court of Appeals determined that the Federal Aviation Act does not permit grant of such certificates, holding that only unrestricted route-type services between specified cities may be authorized by a certificate of public convenience and necessity, and that the Board in any event applied erroneous standards of fitness in licensing the supplemental carriers.

Following the decision below, Congress enacted, and the President approved (on July 14, 1960), Public Law 86–661, set forth in the Appendix, *infra*, pp. 5–7. This statute authorizes the Board to validate, for a period not to exceed twenty months, the certificates which the judgment of the Court of Appeals would set aside. The accompanying legislative reports state that the Act is a "stopgap" designed to provide Congress adequate time to deal with the over-all problem by permanent legislation.[2] In light

[2] See, *e.g.*, House Report No. 1877, 86th Cong., 2d Sess., p. 2, which states as follows:

> PURPOSE OF LEGISLATION—The committee amendment in the nature of a substitute gives the Civil Aeronautics Board temporary authority to permit 25 supplemental air carriers (the so-called nonscheduled airlines) to conduct limited operations for 12 months, despite a ruling of the U.S. Court of Appeals for the District of Columbia Circuit on April 7, 1960, which held that the Board exceeded its authority in granting limited certificates to these carriers.
>
> This stopgap legislation will give the Congress an opportunity to explore in more detail important problems of policy raised by the decision. One of the principal questions involved in any future permanent legislation will be whether or not the Board should be authorized to issue certificates to supplemental air carriers granting limited authority to carry individually ticketed passengers or individually waybilled property between points not specified in the certificate.

of Public Law 86–661, petitioners have suggested to the Court (Motion of August 26, 1960) that if the Court does not now desire to consider the case, it should hold the petition in abeyance pending further action by the Congress.

We agree with petitioners that the case has not yet become moot and that Congress did not intend by its interim legislation to preclude review of the judgment below if the Court deemed such review appropriate. However, it now appears that the problem is not an immediate one (Congress having declared that the Board in all events may validate the conduct of the supplemental operations in question for a period of twenty months) and that Congress proposes to provide a permanent solution before the controversy revives. In light of these developments, the Government has refrained from filing a petition on behalf of the Civil Aeronautics Board.

A question remains, however, as to the appropriate disposition of the petition filed by the supplemental carriers. As already noted, the case is not moot since it cannot be said with certainty that permanent legislation will be enacted. At the same time, it is doubtful that this Court would conclude that it should attempt to resolve difficult statutory questions which, owing to the enactment of interim legislation, are not now pressing and which, in all probability, will be permanently resolved by Congress before the interim legislation expires. In order to preserve their rights, petitioners have suggested that, if the Court decides against granting immediate review, it might appropriately hold the petition until a later date. This, of

course, might entail holding the petition until a subsequent term of Court.

An alternative and, we suggest, a preferable procedure would be to grant the writ, vacate the judgment below and remand the case to the Court of Appeals with instructions to retain jurisdiction until such time as further legislation has been enacted or Public Law 86–661 has expired. Under this procedure, if the case does become moot, the Court of Appeals may thereupon dismiss it. If, on the other hand, the controversy does revive either because of the failure of Congress to enact permanent legislation during the twenty-month period or because of question as to the applicability and effect of new legislation, the Court of Appeals will be free to reconsider its decision and enter a new judgment. Upon entry of such judgment, the parties, of course, would have full opportunity to seek further review by this Court.

Respectfully submitted.

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SEPTEMBER 1960.

APPENDIX

PUBLIC LAW 86-661, 86TH CONGRESS, JULY 14, 1960

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Civil Aeronautics Board (hereinafter in this Act referred to as the "Board") is empowered—

(1) To validate for a period not to exceed twenty months from the date of enactment of this Act, without further proceedings, any temporary certificate of public convenience and necessity for supplemental air transportation issued pursuant to Board Order E-13436 of January 28, 1959, or Board Order E-14196 of July 8, 1959, which certificate has not been revoked or otherwise terminated by the Board on or before the date of enactment of this Act; and

(2) to confer interim operating authority to engage in supplemental air transportation for a period not to exceed twenty months from the date of enactment of this Act upon any person or air carrier which (A) has operated in interstate air transportation as a supplemental air carrier pursuant to authority granted under Board Order E-9744 of November 15, 1955, or (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act.

SEC. 2. (a) Nothing in this Act shall be construed to affect the authority of the Board—

(1) to maintain any enforcement or compliance proceeding or action against the holder of a certif icate of public convenience and necessity issued pursuant to Board Order E–13436 of January 28, 1959, or Board Order E–14196 of July 8 1959, or against the holder of any operating authority conferred under Board Order E–9744 of November 15, 1955, which proceeding or action is pending before the Board on the date of enactment of this Act; or

(2) to institute, on or after the date of enactment of this Act, any enforcement or compliance proceeding or action against the holder of any certificate or operating authority referred to in paragraph (1) of this subsection with respect to any violation of (A) the provisions of the Federal Aviation Act of 1958, (B) the provisions of such certificate, (C) the terms of such operating authority, or (D) the regulations of the Board, without regard to when such violation occurred.

Any sanction which the Board lawfully could have imposed on the operating authority of an air carrier for any violation referred to in paragraph (2) of this subsection which occurred before the validation of a certificate of public convenience and necessity for, or before the conferring of any operating authority for, supplemental air transportation under this Act, may be imposed on the operating authority of such air carrier granted under paragraphs (1) or (2) of the first section of this Act.

(b) The authority granted to the Board under this Act shall not affect any other authority of the Board to license air carriers to engage in supplemental air transportation.

(c) Any certificate validated, and any operating authority conferred, by the Board under this Act shall extend to service between the State of Hawaii and the other States of the United States to the extent that such service was authorized pursuant to Board Order E–9744 of November 15, 1955. For the purposes of any such certificate or operating authority, the State of Hawaii shall be considered one point.

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